



North Dakota Attorney General's LAW REPORT

Wayne Stenehjem, Attorney General
State Capitol - 600 E Boulevard Ave. Dept 125
Bismarck, ND 58505-0040
(701) 328-2210

April-May-June 2005

TRIAL - SHACKLING OF DEFENDANT

In *Deck v. Missouri*, ___ U.S. ___, (2005) the court held the constitution forbids the use of visible shackles during the penalty phase of a capital case and during the guilt phase in all other cases unless shackling is justified by an essential state interest.

Although the primary issue related to the presence of the defendant in restraints during the penalty phase in a capital murder case, the court examined the historical and legal foundation for the use of restraints during the guilt phase of a criminal trial. The court found the law forbids routine use of visible shackles during the guilt phase permitting them only in the presence of a special need.

A criminal defendant has a right to remain free of visible physical restraints and this right has a constitutional dimension. This right might be overcome in a particular instance by an essential state interest such as physical security, escape prevention, or courtroom decorum.

The fifth and fourteenth amendments to the United States Constitution prohibit the use of visible physical restraints absent a trial court determination and the exercise of its discretion that they are justified by a state interest specific to the particular trial. Such a determination may take into account factors that courts have traditionally

relied on, such as potential security problems and the risk of escape at trial.

Visible shackling undermines the presumption of innocence and the related fairness of the fact-finding process. The use of physical restraints diminishes the right to counsel and interferes with the defendant's ability to participate in his own defense by freely choosing whether to take the witness stand on his own behalf. In addition, visible restraints also undermine the dignified process sought to be maintained in the judicial process.

The court did not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. Due process, however, does not permit the use of physical restraints if the trial court has not taken into account the circumstances of the particular case. The constitutional requirements are not absolute but permit a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. It accommodates the important need to protect the courtroom and its occupants. However, any such determination by the court must be case specific and should reflect particular concerns such as special security needs or escape risks related to the defendant on trial.

GUILTY PLEA - VOLUNTARINESS

In *Bradshaw v. Stumpf*, ___ U.S. ___, (2005) the court held that a trial court is not required to explain a crime's elements to a defendant when the elements have been described to that defendant by his own counsel, and that prosecutorial inconsistencies between the case of

a defendant and a co-defendant did not require voiding defendant's guilty plea.

The defendant and two other men were involved in shooting a husband and wife during a robbery. The husband survived, but the wife died. After being advised the husband survived, the

defendant admitted to participating in the robbery and shooting the husband, but claimed he did not shoot the wife.

The defendant pled guilty to murder and attempted murder and, at the capital sentencing, he asserted a co-defendant urged him to participate in the robbery and it was the co-defendant who fired the fatal shots at the wife. The defendant claimed he had only a minor role in the murder. At the sentencing, the state argued the defendant had shot the wife but also argued that an accomplice to murder could receive the death penalty even though that person did not commit the actual killing. The defendant was sentenced to death for the wife's murder.

After the defendant's proceedings, one of his co-defendants was tried. New evidence was presented that the co-defendant had admitted to firing the shots which killed the wife. The prosecutor argued the co-defendant killed the wife but the co-defendant testified the defendant had shot the wife.

On appeal, the lower courts concluded the defendant must have entered his plea out of ignorance since the trial court did not describe the elements of the crime to him during the plea process, and that the defendant's due process rights were violated by the state's deliberate actions securing convictions of the defendant and his co-defendant for the same crime using inconsistent theories. The defendant's plea and sentence were set aside.

In reversing the lower court's orders, the court first recognized the defendant's guilty plea would be invalid if he had not been aware of the nature of the charges against him, including the elements of the aggravated murder charge to which he pleaded guilty. A guilty plea operates as a waiver of important rights and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences. Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid.

In this case, the defendant's attorneys represented on the record at the plea hearing that they had explained to their client the elements of the aggravated murder charge, and the defendant confirmed this representation was true. While the court taking a defendant's plea is responsible for insuring a record adequate for any review that

may be later sought, the court has never held the judge himself must explain the elements of each charge to the defendant on the record. The constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects the nature of the charge and the elements of the crime were explained to the defendant by his own competent counsel. Where a defendant is represented by competent counsel, the court usually may rely on counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.

The court also noted the defendant relied on the perception he obtained a bad bargain by his plea in that the state dropped several non-murder charges and two of the three capital murder charges. The defendant asserted this was a bad trade-off for his guilty plea. Rejecting this argument, the court stated that a plea's validity may not be collaterally attacked because the defendant made what turned out to be a poor deal. The shortcomings of the deal the defendant obtained cast doubt on the validity of his plea only if they show either he made the unfavorable plea on the constitutionally defective advice of counsel or he could not have understood the terms of the bargain he and the state agreed to.

The court also rejected the lower court's determination that prosecutorial inconsistencies between the defendant's and co-defendant's cases required voiding the defendant's guilty plea. The defendant's assertions of inconsistency related entirely to the prosecutor's arguments about which of the two men, the defendant or the co-defendant, shot the wife.

The precise identity of the triggerman was immaterial to the defendant's conviction for aggravated murder. In addition, the defendant never provided an explanation how the prosecution's post-plea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea.

The prosecutor's use of allegedly inconsistent theories may have a more direct effect on the defendant's sentence, since it was at least arguable that the sentencing panel's conclusion about the defendant's principal role in the offense was material to the sentencing decision. The lower court's opinion left some ambiguity as to the overlap between how the lower court resolved the defendant's due process challenge to his conviction and how it resolved the defendant's

challenge to his sentence. The matter was remanded for the lower court to consider the question of how the testimony presented against

the co-defendant and the prosecutor's conduct in both of the cases related to the defendant's death sentence in particular.

BATSON - DISCRIMINATORY JURY SELECTION

In *Johnson v. California*, ____ U.S. ____ (2005), the court reversed Johnson's murder conviction, concluding the standard applied by the trial court in establishing a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986) of jury selection discrimination was not proper.

In Johnson, a prosecutor used three of twelve peremptory challenges to remove all black prospective jurors in Johnson's trial. Johnson was a black man who was charged with killing a 19-month old white child. After the prosecutor exercised the second of his three peremptory challenges against the prospective black jurors, defense counsel objected on the ground the challenge was unconstitutionally based on race, in violation of state and federal constitutions. This argument was rejected upon the ground there must be a strong likelihood that exercise of the peremptory challenges was based upon a group, rather than an individual, basis before a defendant may establish a prima facie Batson claim. The California Supreme Court concluded that Batson left states the task of establishing standards used to evaluate the deficiency of a defendant's prima facie case.

The issue before the court was whether the objector, to establish a prima facie Batson case, must show it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.

In its holding, the court held that it did not. Batson set forth three steps to guide a trial court's constitutional review of peremptory strikes. First, the defendant must make a prima facie case by showing the totality of relevant facts gives rise to an inference of discriminatory purpose. The defendant may establish a prima facie case of purposeful discrimination in selection of a jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant must first show he is a member of a cognizable racial group and the prosecutors exercised peremptory challenges to remove from the jury panel members of the defendant's race. The defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection

practice permitting discrimination by those who have a mind to discriminate. The defendant must show these facts and other relevant circumstances raise an inference the prosecutor used that practice to exclude members of the jury panel on account of their race.

The court never intended this first step be so onerous that a defendant would have to persuade the judge on the basis of all the facts, some of which are impossible for the defendant to know with certainty, the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference discrimination has occurred.

In the second step the state must explain the racial exclusion by offering a permissible race-neutral justification for the strikes. The defendant ultimately carries the burden of persuasion to prove the existence of purposeful discrimination. This burden of persuasion rests with, and never shifts from, the opponent of the strike. Even if the state produces only a frivolous and utterly nonsensical justification for its strike, the case does not end, but proceeds to the third step. The first two Batson steps govern production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. Once the first two steps have been met, the trial court must decide, if a race neutral explanation for the strike is tendered, whether the opponent of the strike has proved purposeful racial discrimination.

The Batson framework was designed to provide actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The three step Batson process simultaneously serves the public purposes it was designed to vindicate and encourages prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.

During the trial of this case, the trial judge noted "we are very close" and, on review, the California Supreme Court acknowledged it "certainly looks

suspicious that all three African-American prospective jurors were removed from the jury.” The court concluded inferences that discrimination

may have occurred were sufficient to establish a prima facie case under the first step of Batson.

BATSON - DISCRIMINATORY JURY SELECTION

In *Miller-El v. Dretke*, ____ U.S. ____ (2005), the court reversed Miller-El's murder conviction, concluding he was entitled to prevail on his Batson claim.

Miller-El was charged with murder and prosecutors used peremptory strikes against ten of the eleven qualified black jury members during the jury selection process. While his appeal was pending, Batson was decided. On remand, the trial court reviewed the voir dire record, heard the prosecutor's justifications for the strikes not explained during voir dire, and found no showing that the prospective black jurors were struck because of their race.

Batson held that a defendant can make out a prima facie case of discriminatory jury selection by the totality of the relevant facts about a prosecutor's conduct during the defendant's own trial. Once that showing is made, the burden shifts to the state to come forward with a neutral explanation of the strikes. The trial court must then determine if the defendant has shown purposeful discrimination in light of all relevant circumstances.

A defendant may rely on all relevant circumstances to raise an inference of purposeful discrimination. When illegitimate grounds like race are an issue, a prosecutor simply has to state his reasons as best he can and then stand or fall on the plausibility of the reasons he gives for the strikes. A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because the trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Looking at the record, the court reviewed the prosecutor's explanations for the strikes. The court referred to the explanations as “incredible” and a selection process replete with evidence that prosecutors were selecting or rejecting potential jurors because of race. The prosecutors used peremptory strikes to exclude 91 percent of the eligible black jury panelists, a disparity unlikely to have been produced by happenstance. Side-by-side comparisons were made of some black panelists who were struck and white panelists who were not. If a prosecutor's reason for striking a black panelist applies just as well to white panelists allowed to serve, that is evidence tending to prove purposeful discrimination. The court also found broader patterns of bias during jury selection. Texas law in this case permitted either side to shuffle the cards bearing panel member names to rearrange the order in which they are questioned. Members seated in the back of the courtroom may escape voir dire, for those not questioned by the end of the week are dismissed. The prosecution shuffled the cards when a number of black members were seated in the front of the panel at the beginning of the second week. The third week, they shuffled when the first four members were black, placing them in the back.

The court also looked at contrasting voir dire questions to black and non-black panel members. These questions indicated the state was trying to avoid black jurors. Prosecutors noted the race of each of the jurors and prosecutors took their cue from a twenty year old manual on jury selection with an emphasis on race. The court found clear and convincing evidence the prosecutor's strikes of potential jurors were racially motivated.

INEFFECTIVE ASSISTANCE OF COUNSEL

In *Rompilla v. Beard*, ____ U.S. ____, (2005), the court held that Rompilla received ineffective assistance of counsel due to his counsel's failure to examine information the prosecutor intended to rely upon during the penalty phase of a capital murder case.

Rompilla was found guilty of murder and, during the penalty phase, the prosecutors sought to prove aggravating factors to justify a death sentence. Evidence was presented on the aggravating factors and Rompilla's evidence in mitigation consisted of relatively brief testimony by his family members.

Rompilla claimed in state court that he received ineffective assistance because trial counsel failed to present significant mitigating evidence about his childhood, mental capacity, health, and alcoholism. During the habeas corpus and appeals process, the court concluded that, while counsel failed to investigate adequately, the investigation went far enough to leave counsel with reason to think further efforts would not be a wise use of limited resources available to them. Rompilla's counsel had been told by Rompilla and his family members that no mitigating evidence was available. In reversing Rompilla's conviction, the court noted this was not a case in which defense counsel simply ignored counsel's obligation to find mitigating evidence. Rompilla's attorneys, as public defenders, made a number of efforts, including interviews with Rompilla and his family members and examination of mental health experts who gave opinions in the guilt phase. None of these sources proved particularly helpful. In addition, Rompilla's own contributions to any mitigation were minimal in that he was uninterested in helping, making statements his childhood and schooling had been normal. At times, Rompilla was actively obstructive by sending counsel off on false leads.

The court found, however, that Rompilla's counsel did not examine the file or evidence the prosecutor would rely upon in arguing for the death penalty. The record contained references in which it was clear Rompilla's counsel had not reviewed the prosecutor's file or transcripts or proceedings that would be used to report a finding of aggravating factors justifying the death sentence.

Rompilla's counsel knew the state intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence. In addition, the state would attempt to establish this history by proving Rompilla's prior conviction for rape and assault and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in an earlier trial. Prosecutor's plans were provided to the defense counsel prior to trial in a plea letter. A prior conviction was a public document readily available for the asking at the courthouse where Rompilla was to be tried.

With every effort to view the facts as a defense lawyer would have done at the time, the court found it difficult to see how counsel could have failed to realize that without examining the readily

available file they were seriously compromising their opportunity to respond to a case of aggravation. The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts included obtaining the readily available file in the prior conviction, learning what the state knew about the crime, discovering any mitigating evidence the state would downplay, and anticipating the details of the aggravated evidence the state would emphasize. Without making a reasonable effort to review the file, defense counsel could not have known whether the prosecution was quoting selectively from the transcript or there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing due to the similarity of the violent prior offenses to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for a residual doubt was beyond any hope.

A notion that defense counsel must obtain information the state has and will use against the defendant is not simply a matter of common sense. The ABA Standards for Criminal Justice state is a duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. Defense counsels' failure to look at the prosecutor's file fell below the line of reasonable practice. Even when the defendant's family members and the defendant himself suggested no mitigating evidence was available, the defendant's lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence as aggravation at the sentencing phase of trial.

The court also found Rompilla was prejudiced by the ineffective assistance of his counsel. If defense lawyers had looked in the file on Rompilla's prior conviction, they would have found a range of mitigating leads that no other source had opened up. Prison files pictured Rompilla's childhood of mental health very differently from anything the defense counsel had seen or heard. The same file disclosed test results showing mental illness and test scores showing a third grade level of cognition after nine years of schooling. Evidence in the files also establish that

Rompilla's parents were severe alcoholics involved in violent and abusive relationships. Rompilla was beaten by his father and often locked in a small wire mesh dog pen with his brother. He was not allowed to visit other children

or to speak to anyone on the phone. The home had no indoor plumbing, Rompilla slept in the attic with no heat, the children were not given clothes and attended school in rags. The jury heard none of this evidence.

SEARCH AND SEIZURE - SEARCH WARRANT - NEXUS TO PLACE TO BE SEARCHED

In *State v. Nelson*, 2005 ND 59, 693 N.W.2d 910, the court reversed the defendant's conviction, remanding the case for an order granting a motion to suppress.

A search warrant was issued to search the defendant's home for contraband and drug paraphernalia. The warrant affidavit stated the defendant and his brother Monte purchased substantial quantities of pseudoephedrin, lithium batteries, heat lamps, and light bulbs with purchases having been made at several southwest North Dakota businesses during a week period. This evidence, as well as the experience of the law enforcement officers as disclosed in the search warrant affidavit, led the trial court to conclude the affidavit established a substantial basis for the conclusion the defendant and Monte purchased items likely to be used for manufacture methamphetamine. During an investigation of the theft of an anhydrous ammonia tank during the same time period the batteries, pseudoephedrin, and other items were purchased, a taped video recording showed the suspects using a red Geo Metro with Monte being a passenger and defendant believed to be the driver. However, an officer testified that he was unable to identify the defendant in the taped videos as the driver, but believed the defendant was probably driving because it was his vehicle and during the past two years the only person the officer ever saw driving the car was the defendant.

After the suppression hearing, the trial court rejected any claim in the search warrant affidavit that the defendant had been identified as a driver of the vehicle. This conclusion impliedly found the affidavit statement that the defendant had been identified as the driver of the vehicle was intentionally false or made with reckless disregard of the truth.

In reversing the conviction and the original order denying suppression of evidence, the court recognized there must be a nexus between the place to be searched and the contraband sought to establish probable cause for a search.

Circumstantial evidence may be enough to establish the nexus. Although the defendant's brother was identified at the scene of a theft of anhydrous ammonia in a red Geo Metro, the defendant was not identified as a suspect at the scene. There was no evidence presented in the affidavit supporting the search warrant that the car in the video was owned by the defendant or that the officers had only seen the defendant driving that car in the past. The affidavit stated the license plate on the car seen in the video was not visible. There was no evidence in the affidavit that the license plate number on the car at defendant's residence had been checked and the car belonged to the defendant. The affidavit only noted a car appearing to be the same as the unidentified car used in the theft was observed at the defendant's home at a later date. Excluding facts the trial found to be inaccurate or of no value in establishing probable cause, the affidavit contained the following relevant information. 1) After the date of the theft, a red Geo Metro was observed at the defendant's residence; 2) the defendant and Monte purchased considerable quantities of pseudoephedrin, batteries, and other items used in the manufacture of methamphetamine; and 3) the defendant and Monte have criminal records including drug offenses.

The trial court found quantity and combination of items purchased was enough to provide probable cause to search for evidence of the manufacture of methamphetamine. The Supreme Court stated that simultaneous purchase of innocent items can become suspicious under circumstances indicating the items will be used to manufacture drugs, but the information provided in the affidavit must be sufficient to establish probable cause to believe contraband will be found in the place to be searched. Mere suspicion that criminal activity is taking place which may warrant further investigation does not rise to a level of probable cause to search.

In this case, after omitting the false and misleading statements in it, the affidavit did not

contain sufficient facts to warrant a person of reasonable caution to believe contraband probably would be found at defendant's residence. The purchase of considerable quantities of the methamphetamine paraphernalia,

without more, was simply inadequate to establish a sufficient nexus between the place to be searched, the defendant's residence, and the contraband to be found.

TRIAL - HEARSAY - STATEMENTS REGARDING SEXUAL ABUSE - OBVIOUS ERROR

In *State v. Krull*, 2005 ND 63, 693 N.W.2d 631, the court affirmed the defendant's conviction of two counts of gross sexual imposition.

The defendant was charged with two counts of gross sexual imposition for sexual contact with two young girls. Prior to trial, the state provided notice of intent to introduce various hearsay statements to the jury, consisting of the girls' statements to their respective parents, the girls' separate statements to a deputy sheriff, and one girl's statement to a forensic interviewer and the other victim's parents. Admissibility was sought under North Dakota Rule of Evidence 803(24) regarding a child's statement of sexual abuse if the court deems the statements sufficiently trustworthy. The trial court did not make any specific findings regarding admissibility, but simply repeated the language of the applicable hearsay rule and ordered the statements admitted.

At trial, the state called the two girls to testify and the defense questioned the girls' veracity during cross examination. Subsequently, the girls' previous hearsay statements were introduced to the jury. The defense did not object to the introduction of the hearsay statements and, by stipulation of the parties, the defense actually offered into evidence the forensic interviewer's videotaped interviews with each of the girls.

The court first questioned whether North Dakota Rule of Evidence 803(24) was applicable to this case in light of North Dakota Rule of Evidence 801(d)(1)(ii) which excludes from the hearsay universe a declarant's prior consistent statement offered to rebut a charge of recent fabrication. Upon the defense calling the girls' veracity into question, it is plausible the state was allowed to introduce the girls' prior consistent statements to rebut the charge of recent fabrication. However, the court would analyze the case under Rule 803, the sole evidentiary matter raised on appeal and briefed by the parties.

North Dakota Rule of Evidence 803(24) requires a trial court make explicit findings as to what

evidence it relied upon to conclude the statements provide sufficient guarantees of trustworthiness. The court must also explain its reasons for either admitting or excluding the testimony so a defendant can be assured the required appraisal has been made, and so an appellate court can properly perform its appellate review function. A trial court must make an in-depth evaluation of the proposed testimony, not merely quote the terms of the rule and order the testimony admitted. The court should make specific findings of the facts relevant to reliability and trustworthiness and explain how those facts support the conclusion of admissibility.

In this case, the trial court abused its discretion and committed plain error in admitting the hearsay statements without making specific findings of the facts relevant to reliability and trustworthiness, and by not explaining how those facts support the conclusion of admissibility. While there is evidence in the record supporting admissibility of the statements, it was no means apparent or self-evident that admissibility was the only proper choice. This is why detailed findings and explanations are so vital to insure the defendant's rights and a proper appellate review.

Although the trial court committed plain error, the court could not conclude the error affected the defendant's substantial rights. Even if the district court had excluded the hearsay statements, the court did not believe the ultimate outcome of the trial would have changed. The hearsay statements in this case merely served a corroborative role, rather than being of primary importance. Both girls took the stand and reiterated their allegations regarding the defendant's involvement in the crimes. In addition, during a law enforcement interview, the defendant implicated himself in these crimes. Adding the defendant's inculpatory and unrefuted statements to the girls' allegations in open court, a guilty verdict reasonably results. The inclusion or exclusion of the girls' hearsay statements did not alter this equation. The defendant's argument that, in absence of the trial court's negative ruling,

his trial strategy may have been different or he might have taken the stand in his own defense was purely speculative and not supported by any offer of proof contained in the record.

Although the defendant cannot demonstrate an error affecting his substantial rights, the court noted that a defendant's rights under the confrontation clause are not violated by the

introduction of a child-victim's hearsay statements if the child takes the stand and is available for cross examination regarding the prior statements. The girls took the stand and were subjected to extensive cross-examination regarding their prior statements. These facts counter any contention the defendant may have suffered a serious constitutional injustice warranting the court's rectification.

JURY INSTRUCTIONS - LESSER INCLUDED OFFENSE

In *State v. Keller*, 2005 ND 86, 695 N.W.2d 703, the court affirmed the defendant's convictions of conspiracy to commit murder, attempted murder, and reckless endangerment.

The defendant was involved in a shootout with Bismarck Police Officers while in a mobile home with a female juvenile and another individual. During the incident, the other individual was shot and killed by an officer. A police officer was shot in the leg with a bullet later determined to have come from a weapon possessed by the defendant. Shots were fired through a bedroom door by both the defendant and the deceased.

After his convictions, the defendant claimed the trial court should have instructed the jury that criminal facilitation was a lesser included offense of conspiracy to commit murder and of attempted murder, and that reckless endangerment was a lesser included offense of attempted murder.

The defendant's requested instructions on the lesser included offenses were submitted to the court on the second to last day of trial. The trial court denied the instructions, concluding they were not timely and were not supported by evidence received at trial.

The record established there was no order directing when requested instructions were to be submitted. Because the propriety of instructions on lesser included offenses may require consideration of evidence presented at trial, the court declined to conclude the defendant's proposed instructions may be refused in this case solely because they were submitted during the trial.

There is no constitutional right to a "lesser included offense" instruction. The instruction historically has been treated as part of the procedural criminal law as opposed to the substantive criminal law. Lesser included

offenses are said to be relevant to double jeopardy analysis in determining what offense a defendant can be convicted of as well as entitlement to the instruction.

The right to a lesser included offense instruction requires first that the offense be a lesser included offense of the greater and, second, the evidence be such that a jury could rationally find a defendant not guilty of the greater and guilty of the lesser. In addition, the instruction must be requested.

Under North Dakota law, the right to a lesser included offense instruction is not constitutional in magnitude. It is not found in North Dakota's criminal code. Such a right is derived from the United States Supreme Court's interpretation of Federal Rule of Criminal Procedure 31 that parallels North Dakota Rule of Criminal Procedure 31.

The court noted that some erroneously assume the right to a lesser included offense instruction is derived from our criminal code, and the definition of "included offense" for the purposes of our criminal code is the relevant definition for the right to a lesser included offense instruction. The right to a lesser included offense instruction is derived from the United States Supreme Court decision in *Berra v. United States*, 351 U.S. 131 (1956), and that case's definition of a "lesser included offense" is not necessarily the definition of "included offense" from North Dakota's criminal code.

In *Berra*, the court said that in a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. Later cases explained the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser included offense

instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser included offense. The court has recognized to hold otherwise would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge.

The court applied the history surrounding Federal Rule of Criminal Procedure 31 with equal force to North Dakota Rule of Criminal Procedure 31. The court stated although some of its previous decisions employ the definition of “included offense” in the North Dakota Criminal Code in analyzing entitlement to a “lesser included offense” instruction, the court will no longer rely on that definition for analysis.

The court will apply an elements-of-the-offense analysis. For an offense to be a lesser included offense, it must be impossible to commit the greater offense without committing the lesser. For a lesser included offense instruction, there must be evidence on which a jury could rationally find beyond a reasonable doubt that the defendant is not guilty of the greater offense but is guilty of the lesser.

Absent a request for an instruction on a lesser included offense, a trial court need not give such an instruction. Either the prosecution or the defense may request a lesser included offense instruction, or the court on its own may give such an instruction. The instruction must require an acquittal of the offense charged before consideration of lesser included offenses.

Applying the elements of the offense analysis to the defendant’s claims, the court rejected the

assertions that he was denied the lesser included offense instructions.

Although the court has previously concluded that criminal facilitation is a lesser included offense of accomplice liability under our criminal statutes, it is possible to commit the crime of conspiracy without necessarily committing the crime of facilitation. As a result, facilitation is not a lesser included offense of conspiracy. Conspiracy requires an agreement but no actual assistance by a charged individual. Criminal facilitation requires actual and substantial assistance but no agreement. The court also rejected the defendant’s claim that criminal facilitation was a lesser included offense of attempted murder. Criminal facilitation requires a person to knowingly provide substantial assistance to another, while criminal attempt requires the person himself or herself to intentionally engage in conduct that constitutes a substantial step toward the commission of the crime. Because it is possible to commit criminal attempt without assisting another, criminal facilitation is not a lesser included offense of attempted murder.

One offense is not a lesser included offense of another if it is possible to commit the greater offense without committing the lesser offense. Rejecting the claim that reckless endangerment is a lesser included offense of attempted murder, the court noted a person can be convicted of attempted murder for having taken a substantial step toward the commission of the crime of murder even if there never was, in fact, a substantial risk of serious bodily injury or death to another as required for reckless endangerment. Consequently, it is possible to commit the greater offense of attempted murder without committing reckless endangerment.

INVESTIGATORY STOP - INFORMANT

In *Anderson v. Director, North Dakota Department of Transportation*, 2005 ND 97, 696 N.W.2d 918, the court concluded that a stopping officer did not have sufficient reasonable and articulable suspicion sufficient to justify the stop of Anderson’s vehicle.

A motorist reported to a sheriff’s office a “possible reckless driver or drunk driver.” The informant witnessed Anderson’s vehicle hit cones in a construction zone and reported the license plate number, color, and make of Anderson’s vehicle.

Some of this information was relayed by the dispatcher to a patrolling deputy. The deputy was aware the informant was continuing to follow Anderson’s vehicle and provide updates and direction of travel and location to sheriff’s dispatch.

After catching up to both vehicles, the deputy passed the informant and continued to follow Anderson for two miles before stopping him. The deputy did not observe Anderson perform any illegal or erratic driving before the stop. The informant’s name had not been relayed to the

deputy but the deputy was aware he had pulled off to the side of the road and was being interviewed by an assisting officer when the deputy stopped Anderson.

After the stop, the deputy testified he witnessed slurred speech and detected the odor of alcohol when speaking with Anderson. The deputy asked Anderson if his broken mirror was caused by hitting cones in the construction zone and he replied "yes." Anderson was arrested and the Department of Transportation later suspended his driver's license. The district court reversed the Department's decision, finding the arresting officer did not have the required reasonable and articulable suspicion necessary to stop Anderson's vehicle.

To make a legal investigative stop of a vehicle, an officer must have a reasonable and articulable suspicion that the motorist has violated or is violating the law. Information from a tip may provide the factual basis for the stop. In evaluating the factual basis for a stop, the court will consider the totality of the circumstances. This includes the quality or content and quality or degree of reliability of the information available to the officer. The general rule is the lesser the quality or reliability of a tip, the greater the quantity of information is required to raise a reasonable suspicion.

Information from an informant whose identity is easily ascertainable has a higher indicia of reliability than information obtained from a purely

anonymous informant. The tip in this case has a higher indicia of reliability than information from a purely anonymous informant. The deputy was aware before the vehicle stop that the informant could be identified, because dispatch had described the informant's vehicle to him and he observed the informant's vehicle pull over as he stopped Anderson. He knew an assisting officer was interviewing the informant. As the reliability of the tip moves up the scale, the quantity of the information sufficient to raise a reasonable and articulable suspicion is less.

In this case, the record established the informant reported to the dispatcher that he had witnessed a "possible reckless driver or drunk driver" and he was following the vehicle. The informant provided a description of both his vehicle and the suspect vehicle, including the license plate number. The Department failed, however, to establish on the record that the informant told the dispatcher the suspect hit cones in a construction zone and the dispatcher gave the information to the deputy. The record only indicates the dispatcher relayed to the deputy the descriptions of the informant and the suspect's vehicles and that the informant had witnessed a "possible reckless driver or drunk driver." On these facts, although the informant had a higher indicia of reliability than a purely anonymous informant, the communication by the dispatcher to the deputy of the bare assertion of a "possible reckless driver or drunk driver" is not of a sufficient quantity to provide the reasonable and articulable suspicion sufficient to justify a stop of Anderson's vehicle.

SEARCH WARRANT - PROBABLE CAUSE - EXECUTION OF WARRANT

In *State v. Driscoll*, 2005 ND 105, 697 N.W.2d 351, the court affirmed the defendant's conviction of several drug related offenses.

A confidential informant worked with police to buy cocaine and methamphetamine from an individual named Williams. During two separate drug buys, Williams met the informant to arrange the drug purchase and obtain money. On one occasion, Williams, who was being tracked by police, proceeded alone to an apartment building to obtain the drugs. On another occasion, both Williams and the informant proceeded to the apartment building in the informant's vehicle. At that time, Williams once again entered the apartment building.

During the first buy, Williams called the informant from a telephone number later traced to a specific apartment unit in the building. The apartment unit was rented to Scott Olson and a search of the police computer system revealed that Olson had been named with several individuals in cocaine trafficking in the city. Police also learned Olson previously had been involved in a verbal dispute with the defendant at this apartment unit. During the second buy, police, who were listening to the conversation between Williams and the informant, heard Williams refer to his drug source as a female and also as "they."

After getting a search warrant, officers discovered Olson and the defendant in the apartment. The defendant, who was wearing pajamas, ran into the bathroom and attempted to flush a large quantity

of methamphetamine down the toilet. Police secured both occupants of the residence and during the search of a bedroom discovered a purse belong to the defendant. The purse contained a large quantity of cash, methamphetamine, address book, and other documents. Olson told police the defendant had been staying at the apartment six nights a week for five months. She told police she had a purse, computer, and clothes at the apartment.

After her conviction on four drug related charges, the defendant argued there was insufficient probable cause to justify issuance of the search warrant. She claimed there was not a sufficient nexus between the apartment unit and the contraband sought. Specifically, the defendant pointed out that Williams never identified a specific apartment unit, only a person in the apartment unit, as a source of the drugs. He did not offer a physical description of his supplier. And, even though a telephone call was made from Olson's apartment during the first buy, the defendant claimed there was no evidence Williams was using Olson's telephone for anything other than a telephone call.

Examining the affidavit, the court concluded it contained sufficient probable cause to justify issuance of a search warrant for the apartment unit. Under the totality-of-the-circumstances test, there is a substantial basis for the magistrate's determination that contraband and drug evidence would probably be found in the apartment unit.

The court specifically declined to rely on an officer's statement that he had researched the city computer system and learned Olson had been named with other individuals in cocaine trafficking. These brief statements comprise the entire explanation provided by the officer on the matter. These types of statements are unsupported and conclusory in nature and without further elaboration and explanation are insufficient to establish probable cause. Assertions cannot qualify as statements regarding Olson's reputation because it is unknown who named Olson.

The defendant also claimed the contents of her purse should be suppressed because police needed to obtain a second warrant to validly inspect the purse. She claimed certain items are so private and personal the law should afford these items significantly more protection under the fourth amendment, thereby requiring a greater degree of particularization. She described herself

as a visitor to the Olson apartment deserving of heightened protection.

The search warrant was not invalid on its face. The search warrant was limited to the specific apartment unit that police had probable cause to search. The objects of the search revolved around suspected drug trafficking at the apartment unit.

A search for controlled substances, drug paraphernalia, drug money, records of drug transactions, numerical data found on electronic devices, and indicia of residence of the apartment unit, all of which were specifically enumerated in the search warrant was neither indicative of police over-reaching nor the equivalent of a general police search.

The search warrant made no mention of the defendant or her personal property. When the application for the search warrant was made, the police had no knowledge of exactly who was responsible for the drug activity. Police had probable cause to believe drug activity was taking place in the apartment unit, which provided the requisite justification to search. It was not necessary that the search warrant particularize exactly where the drug evidence would be found in the apartment unit.

It is generally recognized that the degree of particularity required is flexible and will vary depending upon the circumstances presented, including the purpose for which the warrant was issued, the place to be searched, the type of crime involved, and the nature of the items sought.

A search conducted pursuant to a search warrant may extend to the entire area covered by the warrant's description. Police searched for, among other things, drugs and money, both of which are relatively small and easily concealed. It is possible these objects would be found in a purse. Although there was a dispute as to whether the purse was open or closed, the resolution of this dispute was immaterial since, pursuant to the warrant, the police were permitted to search the purse or any other item that could reasonably house the object of the search. That a separate act of entry or opening might have been required to search the purse did not trigger a constitutional violation.

The court also rejected the defendant's argument that an additional degree of particularization was required when dealing with private and personal

items. If, in the course of executing a valid search warrant, police come across an item, be it particularized in the warrant or not, that could reasonably contain the object of their search, they are authorized to search regardless of whether the items is arguably private or personal.

Special constitutional concerns arise when dealing with visitors or guests located at a residence subject to a warrant. However, the court did not believe the defendant's argument that she was a visitor to the Olson apartment would render the search of her purse invalid. Knowing the facts as a whole, it was not only reasonable for police to believe the purse could contain evidence of narcotics activity but also reasonable for police to view the defendant, and her property, as being intimately involved with the apartment unit and the drug activity apparently occurring there. A search of the defendant and her property is no more remarkable than a search of Olson and his property. The same conclusion would occur if the defendant was merely a casual overnight guest or visitor in the apartment unit.

The court also rejected the claim the search warrant was invalid because Williams later stated the defendant was not his drug source. Even assuming Williams was telling the truth, it did not change the court's conclusion that the district court did not abuse its discretion in denying any motion for a new trial. Williams' statements only worked to undermine the theory of probable cause

presented by the police, namely that the apartment unit in question was responsible for providing the drugs obtained during the controlled buys. Those dealing in the probable-cause universe might act reasonably yet, when viewed through the prism of hindsight, find their beliefs to have been in error. But, if an accepted reasonable theory of probable cause subsequently proves to be untrue or unfounded, it does not retroactively undermine a previously correct conclusion that probable cause to search existed, invalidate a properly issued search warrant, or release a criminal actor from culpability for crimes uncovered during execution of the search warrant. In addition, the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984), refused to apply the exclusionary rule to evidence obtained in a reasonable reliance on a search warrant ultimately found to be unsupported by probable cause. If a previously invalid probable cause determination can fail to result in exclusion, a previously valid probable cause determination, which in hindsight has purportedly shown itself to be misconceived, certainly should not trigger exclusion. In addition, Williams statements were factually irrelevant to the crimes with which the defendant was charged. The defendant was never charged with any crimes stemming from the two controlled drug buys. Rather, she was charged with possession of drugs and drug paraphernalia and possession of drugs with intent to deliver, crimes directly stemming from the search of the apartment unit.

DUI - INTOXILYZER CHECKLIST

In *City of Grand Forks v. Barnum*, 2005 ND App. 4, 697 N.W.2d 7, the court affirmed the defendant's DUI conviction.

After his conviction, the defendant claimed the city failed to carry its burden to show fair administration of the intoxilyzer test because a copy of the operational checklist was not admitted. The city countered that the intoxilyzer 5000 KB-EP machine has an external printer and did not require a separate form because the external printer prints everything, including the checklist.

For a process to be a necessary part of the approved method, the state toxicologist must expressly include it in the improved methodology and make it a part of the requirement for fair administration. Test results and checklists

generated in administration of the test in this case were printed on a "Form 106-KB-EP." The first paragraph of the approved method to conduct breath tests with the Intoxilyzer 5000 KB-EP stated the test record and checklist will be printed as Form 106-KB-EP at the completion of the subject test.

The approved method entered as an exhibit in the case did not refer to any checklist other than the one generated in the course of administering the test and shown in the printout with the test result. The admission of another checklist was not a foundational requirement for admissibility of the test result generated in a breath test conducted with an intoxilyzer 5000 KB-EP and printed on a "Form 106-KB-EP."

DUI - INJURY-ENHANCED SENTENCING

In *State v. Smith*, 2005 ND App. 5, 697 N.W.2d 368, the court held that the enhanced sentencing language of N.D.C.C. § 39-08-01.2(2), requiring at least 90 days incarceration by a person who causes serious bodily injury upon the commission of a class B misdemeanor DUI offense, was

invalid and unenforceable when sentencing a defendant for a class B misdemeanor. The court concluded the 90 day sentence irreconcilably conflicts with the maximum penalty for a class B misdemeanor and is illegal.

TRESPASS - HEARSAY

In *State v. Bernstein*, 2005 ND App. 6, 697 N.W.2d 371, the court reversed the defendant's conviction for criminal trespass, finding the trial court committed error in refusing to admit evidence the defendant's father had told him to go to the property to retrieve personal items.

Leroy Bernstein deeded property to his daughter and her husband. The daughter and husband lived in a house on the property and allowed Leroy to move his house onto the property, where he lived from 1987 to 2004. Each house had its own driveway. Leroy's son, the defendant, visited him in the house on a daily basis, regularly bringing the mail and newspaper to his father.

In 2003, Leroy was hospitalized and asked the defendant to go to the house and bring certain personal items to him in the hospital. The defendant went to the property but found Leroy's house was locked and a key Leroy kept in his garage had been removed. When the daughter noticed the defendant was at Leroy's house, she told him it was her property and he was not allowed to go into the house, and thereafter posted a no trespassing sign on the driveway leading to Leroy's house.

The defendant claimed that Leroy, after learning of the daughter's refusal to allow the defendant into the house, again told the defendant to go to the house and bring back certain items and use whatever means necessary to get in. The defendant returned to the property and found the house locked. During the visit he removed the no trespassing sign and placed it in Leroy's garage. The daughter then signed a complaint for trespassing.

At trial, the defendant argued he believed he had a license and privilege to be on the property. When asked on direct examination about the statements made to him by his father at the hospital directing the defendant to go to his house, the state objected on hearsay grounds. Leroy

died prior to the trial so the defendant offered into evidence an affidavit from Leroy stating he requested the defendant to bring certain items to him and to enter the home. The state objected to the admission of the affidavit and, at the conclusion of a bench trial, the court ruled that Leroy's affidavit and the defendant's testimony about what his father had told him were irrelevant, and excluded the evidence. The defendant was found guilty.

In reversing the trial court's evidentiary rulings, the court recognized that a trial court has broad discretion in evidentiary matters and its decision to admit or exclude evidence will not be overturned on appeal unless the court abused its discretion. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law.

The defendant was charged with criminal trespass. Under the trespass statutes, "privilege" is the freedom or authority to act and use the property. A person is "privileged" if he may naturally be expected on the premises often and in the natural course of his duties or habits. A person is "licensed" to be on the property if the entry was consensual.

The state was required to prove beyond a reasonable doubt that the defendant knew he was not licensed or privileged to enter his father's house or garage. The defendant's state of mind is an element of the offense, and evidence tending to show his state of mind would be relevant and admissible.

Knowledge need not be absolute but merely a firm belief unaccompanied by substantial doubt. Knowledge is a question of fact. The knowledge requirement is a subjective test and the fact-finder must make a determination based upon whether

the facts and circumstances would have caused this particular defendant to know the requisite facts. The finder of fact must consider all of the surrounding facts and circumstances in determining the defendant's knowledge.

To satisfy the knowledge element of the offense of criminal trespass, the state was required to prove the defendant knew or had a firm belief, unaccompanied by substantial doubt, that he was not licensed or privileged to be on the property.

The trial court appears to have based its conclusion that evidence about Leroy's statements to the defendant in the hospital was irrelevant upon a misinterpretation of the elements of criminal trespass. The court concluded it did not matter what Leroy told the defendant because Leroy did not have authority over property the daughter owned and therefore, the evidence was irrelevant.

The court analysis eliminates the knowledge element of the offense. The crucial inquiry is not, as the trial court stated, whether the defendant was actually licensed or privileged to be on the property, but whether the defendant subjectively knew he was not licensed or privileged to be there. The fact that a person who is ultimately determined to be in charge of the premises tells the defendant to stay off the property is only the beginning of the inquiry. The state must also prove the defendant knew he was not licensed or privileged to be on the property.

There was evidence in this case which may have suggested to a lay person that Leroy had the authority to allow persons on to the property. There was evidence of an unrecorded deed purporting to reverse a life estate in Leroy, and Leroy had paid the real estate taxes on the house. The defendant had for years gone to the house on a daily basis to visit his father, and the daughter admitted Leroy had authority over his house and could determine its use while he was on the property but she exercised control of the house when he was away.

The trial court was presented with a disputed factual issue whether the defendant knew or had a firm belief, unaccompanied by substantial doubt, he was not licensed or privileged to enter his father's house and garage. Under these circumstances, evidence of Leroy's statements

instructing the defendant to go to the house and bring back certain personal items for Leroy were directly relevant to the issue of the defendant's knowledge or belief that he had a license or privilege to be on the property. If the defendant believed his father had the authority to consent to his entry onto the property, the knowledge element of criminal trespass would be missing.

The court also concluded Leroy's statements to his son were not hearsay. A statement offered to show its effect upon the state of mind of the listener, rather than the truth of the matter asserted, is not hearsay. When a person's knowledge or lack of knowledge is at issue, statements affecting the person's state of mind are not hearsay. Out-of-court statements may be offered to explain responsive conduct. Evidence which would otherwise be hearsay may be admissible as bearing on the state of mind of the defendant if it is not offered for the truth of the statement. This nonhearsay use has been invoked with respect to the issue of duress, authorization, volition, motive, good faith, knowledge, belief, and the absence of knowledge.

The defendant's testimony was not offered to prove the statements made by his father were true but to show their effect on the defendant's state of mind and knowledge. The statements were relevant as to whether the defendant believed he had consent and therefore a license to be on the property. The mere fact the statements were made, regardless of their truth, had independent legal significance. The statements made by Leroy to the defendant at the hospital were not hearsay.

The same result may not apply to Leroy's affidavit in which he relates what he told the defendant. The problem is not with Leroy's original statements made to the defendant at the hospital, but with Leroy's subsequent statement in the affidavit that he had made the earlier statements. Leroy's affidavit is offered to prove the matter asserted, the fact that he made the earlier statements. An affidavit offered at trial, in lieu of live testimony by the witness, is classic hearsay and must be excluded unless it comes within one of the recognized exceptions to the hearsay rule. Since this matter was not adequately addressed by the parties, the trial court and the parties would resolve whether Leroy's affidavit falls within an exception to the hearsay rule.

POST-CONVICTION RELIEF - SUMMARY DISMISSAL

In *Berlin v. State*, 2005 ND 110, ____ N.W.2d ____, the court reversed the district court's order summarily dismissing Berlin's application for post-conviction relief.

Berlin, with the assistance of court appointed counsel, pled guilty to felony and misdemeanor offenses. He filed a pro se application for post-conviction relief. The state submitted a response, and, now represented by court-appointed counsel, Berlin requested additional time to supplement the application. A supplemental application for post-conviction relief was filed with the assistance of counsel, including a request for an evidentiary hearing.

The district court, on its own motion without granting an evidentiary hearing, summarily denied Berlin's application for post-conviction relief.

The explicit purpose of the Uniform Post-conviction Procedure Act is to provide a method to develop a complete record to challenge a criminal conviction. The court will review an appeal from a summary denial of post-conviction relief as the court reviews appeals from a summary judgment. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.

A trial court possesses the authority to summarily dismiss an application for post-conviction relief when the statutory triggering conditions are met, in that there is no genuine issue as to any material fact and the party in whose favor the dismissal is entered is entitled to judgment as a matter of law.

Ordinarily, a claim of ineffective assistance of counsel should be resolved in a post-conviction relief proceeding so the parties can fully develop a

record on the issue of counsel's performance and its impact on the defendant's case. An applicant for post-conviction relief need not provide evidence of proof with the application but must set forth a concise statement for each ground of relief and specify the relief requested. For the court to summarily dismiss the application, there must be no dispute as to the material facts, and the state must be entitled to judgment as a matter of law.

In his application, Berlin claimed the prosecution failed to disclose evidence favorable to him and that he received ineffective assistance of counsel. He also asserted he was compelled to be a witness against himself.

The court noted the district court did not conclude the claims were facially invalid but, rather, that Berlin failed to provide evidence to support his claims. However, a petitioner need not provide evidence with an application. The state's response to the application also indicated the existence of a genuine issue of material fact precluding the right to judgment as a matter of law.

An evidentiary hearing would allow Berlin the opportunity to demonstrate whether he was wrongfully misled by his attorney and whether his attorney's conduct fell below the acceptable standard of representation. In cases where the court finds an allegation of deficient performance by counsel facially invalid, a summary dismissal similar to a judgment on the pleadings may be appropriate. Here, however, the district court said it had reviewed the record and found no evidence to support Berlin's claims, rather than concluding the claims were facially invalid. The district court committed error in summarily dismissing Berlin's claims without affording Berlin an evidentiary hearing.

This report is intended for the use and information of law enforcement officials and is not to be considered an official opinion of the Attorney General unless expressly so designated. Copies of opinions issued by the Attorney General since 1993 are available on our website, www.ag.state.nd.us, or can be furnished upon request.